

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

AND

Docket No. 132,499

## ORDER

**ON** the 27th day of September, 1994, the application of the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge George R. Robertson, dated June 20, 1994, came on for oral argument.

## APPEARANCES

The claimant appeared by and through his attorney, Scott M. Price of Salina, Kansas. The respondent and its insurance carrier appeared by and through their attorney, David M. Druten of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by and through their attorney, Norman R. Kelly of Salina, Kansas. There were no other appearances.

# RECORD

The record as specifically set forth in the January 3, 1994, Award of the Administrative Law Judge is herein adopted by the Appeals Board.

## STIPULATIONS

The stipulations as specifically set forth in the January 3, 1994 Award of the Administrative Law Judge are herein adopted by The Appeals Board.

### **ISSUES**

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment with the respondent?
- (2) What is the nature and extent of claimants' injury and disability?
- (3) What, if any, is the liability of the Kansas Workers Compensation Fund?

In the Award of January 3, 1994, Administrative Law Judge George R. Robertson found the injury to claimant's right knee did not arise out of and in the course of his employment and as a result of that finding denied claimant benefits. In its' order of June 10, 1994, The Appeals Board reversed Judge Robertson, finding that claimant's injury to his right knee did arise out of and in the course of his employment and remanded same for findings on the remaining issues of the nature and extent of claimant's injury and disability and the liability of the Kansas Workers Compensation Fund. This appeal stems from the Award of Administrative Law Judge George R. Robertson, dated June 20, 1994, wherein he awarded benefits to the claimant and assessed liability to the Kansas Workers Compensation Fund.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The Appeals Board, having ruled upon the compensability of the claimants knee injury in its Order of June 10, 1994, directs the parties to the Appeals Board's earlier rendered decision regarding the issue of compensability.
- (2) Claimant was assessed a ten percent (10%) impairment of function to the right lower extremity as a result of the injury to his right knee, occurring in September and October of 1988. This impairment of function assessed by Dr. Jeryl Fullen is uncontradicted, is deemed credible and is adopted by the Appeals Board. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d. 146 (1976).
- (3) The Kansas Workers Compensation Fund is assessed one hundred per cent (100%) of the liability and is ordered to reimburse respondent for one hundred per cent (100%) of any and all monies expended by respondent in this matter.

In order for an employer to be relieved of liability, either wholly or partially, from the Workers Compensation Fund, it is the employer's responsibility and burden to show that it hired or retained a handicapped employee after acquiring knowledge of a pre-existing impairment. K.S.A. 44-567(b)

The employer has the burden of proving that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d. 871 (1984). An employee is handicapped under the Act if the employee is afflicted with an impairment of such character as to constitute a handicap in obtaining or retaining employment. Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d. 602, 621 P.2d 448 (1980).

Claimant suffered numerous knee injuries prior to his employment with the respondent including a motorcycle accident in 1979 which led to right knee surgery. Claimant underwent right knee surgery in 1981 for necrosis of the bone at which time his femoral condyle was drilled. In 1982 claimant underwent orthoscopic surgery to the right knee with specific treatment to the claimant's meniscus. In 1987 claimant went to Dr. Sloo suffering from knee complaints but missed no work at that time. Subsequent to these surgeries claimant indicated his knee was in pretty good shape and he was suffering no pain. In August 1988 claimant's job responsibilities with respondent were changed. Claimant was placed in a position where he was required to stand on a hard surface eight to nine (8-9) hours per day running a drill press. His supervisor was told that this was causing him problems. By November of 1988 claimant's leg pain was so severe that he was forced to stop working. Dr. Fullen testified that standing in one place eight to nine (8-9) hours per day set claimant up to have his current problem, indicating the job change had a definite bearing on the re-emergence of claimant's symptoms. Dr. Fullen further testified that without the prior problems, claimant's current chance for problems would have been "very remote."

When claimant was hired, the respondent was aware of his prior knee problems. The claimant considered himself to be diminished in his physical capacities although he did not consider himself to be handicapped. The respondent also was aware in 1987 that claimant had knee problems and went to Dr. Sloo. Claimant attempted on several occasions to bid to jobs which would have taken him off his feet but was unsuccessful in these bids. Claimant advised Bob Allen, a management level employee with respondent, of the suggestions by Dr. Sloo that claimant consider a career change due to knee problems.

The Appeals Board is persuaded that respondent has met its burden of proof in showing that it retained a handicapped employee within the definition of K.S.A. 44-567(b). The Appeals Board finds that the respondent had knowledge of this handicap sufficient to satisfy the requirements of K.S.A. 44-567(b) and further finds that the respondent, Great Plains Manufacturing, Inc., retained a handicapped employee after acquiring such knowledge.

K.S.A. 1992 Supp. 44-567(a)(1) provides in part:

"Whenever a handicapped employee is injured or is disabled or dies as a result of an injury, and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the pre-existing physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund."

Dr. Fullen testified that claimant's early knee problems "set him up" to have his current problem. He also testified that without the prior problems his current chance for

problems would be "very remote." This uncontradicted testimony by Dr. Fullen convinces the Appeals Board that the liability in this matter should be borne by the Kansas Workers Compensation Fund in that claimant's injury probably or most likely would not have occurred "but for" the pre-existing physical impairment of the handicapped employee.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson, dated June 20, 1994, shall be and is affirmed in all respects and an award of compensation is entered in favor of the claimant and against the respondent and the Kansas Workers Compensation Fund for a ten per cent (10%) permanent partial disability on a functional basis to the right lower extremity. The Appeals Board further finds that the respondent is entitled to reimbursement from the Kansas Workers Compensation Fund for one hundred per cent (100%) of any and all compensation, medical expenses and costs paid in this matter.

Claimant is entitled to 42.14 weeks temporary total disability compensation at the rate of \$220.96 per week, totaling \$9,311.25 followed thereafter by 15.79 weeks of permanent partial impairment of function to the right lower extremity at the rate of \$220-.96 per week in the amount of \$3,488.96 for a ten per cent (10%) permanent partial impairment of function to the right lower extremity making a total award of \$12,800.21. The entire award is due and owing and is ordered paid to the claimant in one lump sum, minus any amounts previously paid.

The Kansas Workers Compensation Fund shall reimburse the employer and insurance carrier one hundred per cent (100%) of any and all compensation, medical expenses and costs expended in this case.

The fees necessary to defray the expense of the administration of this action are hereby assessed against the respondent with reimbursement to the respondent by The Kansas Workers' Compensation Fund of one hundred per cent (100%) of said fees.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1994 .

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott Price, 148 S. 7th, Salina, Ks, 67401

David M. Druten, P.O. Box 14548, Lenexa, Ks, 66285-4548

Norman R. Kelly, P.O. Box 2388, Salina, Ks, 67402-2388

George R. Robertson, Administrative Law Judge

George Gomez, Director